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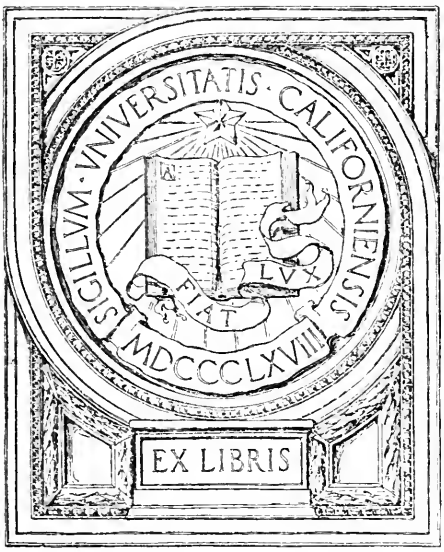

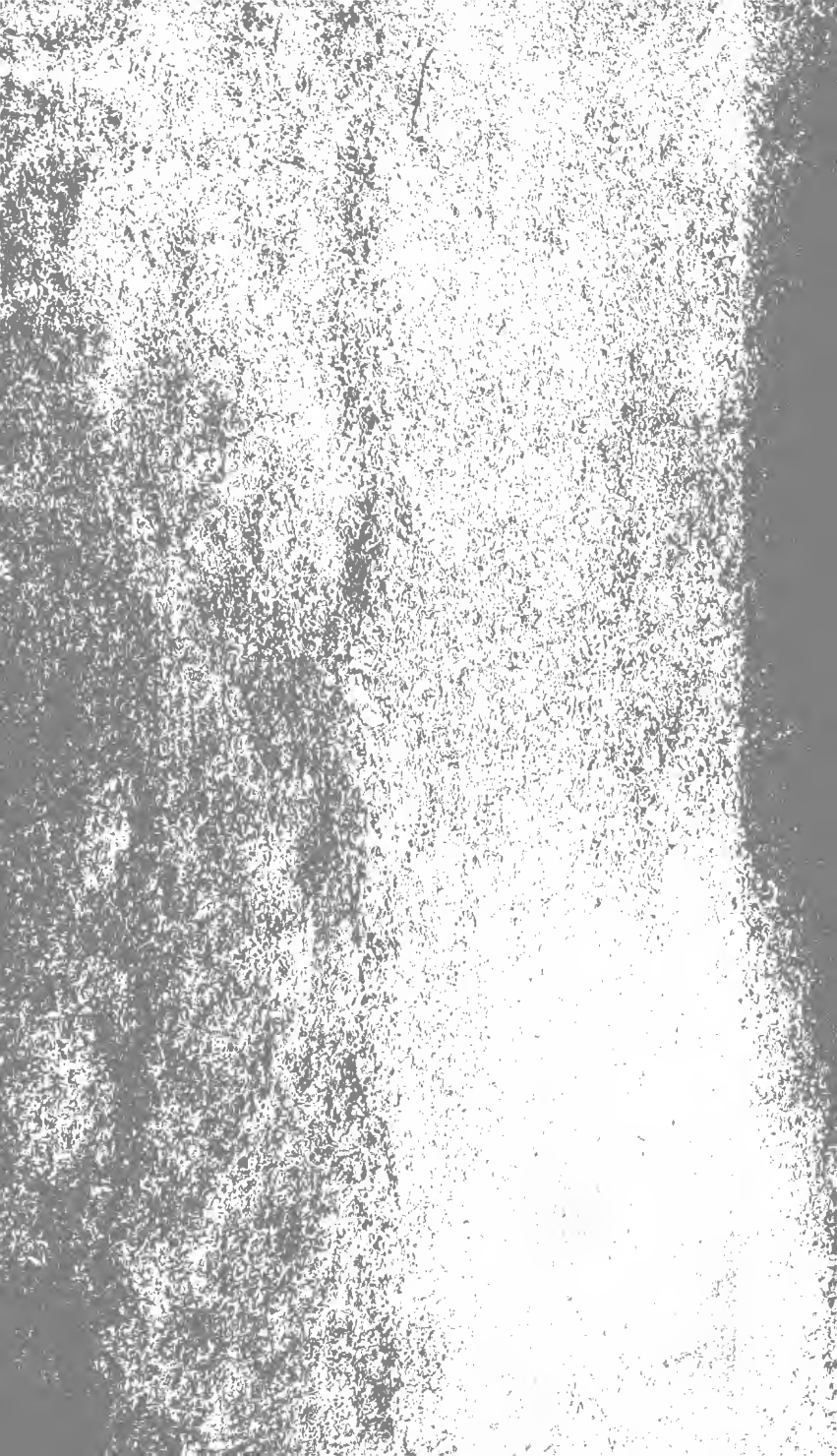

THE LAW AND THE DOCTOR
VOL 2.
THE PHYSICIAN AS WITNESS.

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THE LAW AND THE DOCTOR.

A COMPILATION OF THE FUNDAMENTAL LEGAL PRINCIPLES GOVERNING THE RELATION OF THE PHYSICIAN TO HIS PATIENTS AND THE COMMUNITY AT LARGE

VOLUME II.

THE PHYSICIAN AS WITNESS.

PREPARED EXPRESSLY FOR PHYSICIANS BY

THE ARLINGTON CHEMICAL COMPANY

YONKERS, N. Y.

FIRST WORD.

THE physician who is unfamiliar with court procedure, and who is more or less unversed in the ordinary rules governing the examination of witnesses and the taking of testimony, may, at any time, find himself upon the witness stand and at the mercy of a hostile attorney. The object of this brochure is to place at the immediate disposal of the physician a brief but comprehensive guide, from which he may quickly obtain such information as may be necessary to enable him to understand both his own and his patient's rights and privileges, whenever he may be called as witness in a court of justice. It is believed that this complete but succinct epitome, together with the preceding monograph, "THE PHYSICIAN'S CIVIL LIABILITY FOR MALPRACTICE," will be welcomed and appreciated by the physicians of America, whose multifarious professional duties leave but scant time in which they may familiarize themselves with collateral subjects. That each and every copy may prove of real and practical value to its recipient is the earnest desire of

THE ARLINGTON CHEMICAL CO.,

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THE LAW AND THE DOCTOR.

VOL. II.

THE PHYSICIAN AS WITNESS.

Organization of the Court.

Upon examining the trial court, it is found, in respect to its functions, to consist of two agencies—one for ascertaining and defining the law as it applies to the various phases of the particular case; the other for determining and declaring the facts to which the law is applied. The first of these is the presiding judge, who, as such, is frequently referred to as "the court," and the second is the jury. Thus it is that the competency of the witness and legal admissibility of the evidence to be given by the witness are passed upon by the court, but the weight and effect of that evidence, when admitted, are for the jury to determine.

Capacities in which Physician may be Required to Testify.

The physician may be required to take the witness stand in either of two capacities. He may be called to testify in regard to facts which have come under his observation relating to the issue, or he may be called to enlighten the court and jury by giving his opinion as to the medical aspect of the facts proved or assumed.

Attendance in Court, How Compelled.

The attendance in court of a witness, whether an ordinary witness or an expert witness, is secured by the service of the writ of subpœna *ad testificandum;* or, if he is to be required to bring with him books, papers or documents in his possession or under his control, by the service of the writ of subpœna *duces tecum.* This

writ must describe the papers required to be brought with such reasonable certainty that the witness will readily understand what they are. The service of the writ is accomplished by showing the original and leaving a copy of the subpœna or a ticket containing its substance with him, and by tendering to him the fee allowed by law for one day's attendance and the mileage allowed to him by law for traveling to and returning from the place at which he is required to attend.

It is only in civil cases, however, that the payment or tender of fees is a necessary element of service; in criminal cases the witness is required to defray his own traveling expenses, and, after attending, accept such provision as may be made by law for his reimbursement in the way of *per diem* and mileage.

The question of the character and amount of fees to which the physician as a witness is entitled will receive attention in the closing pages of this article.

Disobedience to the mandates of a subpœna, properly served, is punishable by commitment for contempt of court; in addition, the person so subpœnaed, by failing to appear, becomes liable to an action by the party in whose interest he was called to testify, for the recovery of damages sustained by reason of his failure to respond. In some jurisdictions (*a*) this liability is recognized by express statute and liability in an additional sum imposed as further penalty.

Competency of Witness.

Ordinarily there are many objections which may be urged against the competency or legal capacity of the witness to testify, which, manifestly, may not be urged against the class of witnesses in consideration. Thus, under the head of defect of understanding, may be grouped infants of such immature mind as to be unable to comprehend the import of an oath, idiots, insane persons and intoxicated persons, the capacity of which witness is to be determined by the trial judge.

The want of religious belief was, at common law, a complete bar to the right of a witness to testify. This ground of

a) See N. Y. Code of Civil Procedure, Sec. 853.

incompetency has been removed, in whole or in part, by statutes in many of the States. Interest in the subject-matter in litigation also disqualified a witness at common law, but this disqualification has ceased to exist by legislative enactment in the several States, except where the other party to the suit is dead or mentally incapacitated. Husband and wife were also at common law disqualified to testify for or against each other in a suit in which the other was interested. This ground of disqualification is also removed or modified in many States.

In addition to the foregoing, there is a ground of disqualification which applies peculiarly to the physician, or, rather, to physicians, clergymen and lawyers. That is, that information obtained in the course of professional communications is privileged and cannot be disclosed on the witness stand. This ground of incompetency as witness is of such importance as to require an extended examination elsewhere in this volume.

The proper time for an objection to the competency of a witness to be made is when the witness is first placed on the stand and before the examination-in-chief is begun. This rule was formerly so strictly applied that an objection to the competency of a witness, made after he was sworn-in-chief, came too late; but it has now been relaxed to such an extent that objections may generally be made whenever facts are disclosed in the examination-in-chief impugning the competency of the witness.

Examination of Witness.

The witness, being competent, is sworn by an officer of the court and examined by the counsel for the party in whose behalf he was called. This examination may, with certain limitations, take either of two forms: The witness may give his testimony in response to questions put to him by the party calling him, or he may give his testimony in narrative form, relating the facts or conditions as he observed them, in response to a general question or request. This latter method is, however, open to some criticism and is, therefore, subject to the discretion of the court. (*a*)

At any time during the examination, the trial judge may ask

(*a*) Clark *v.* Field, 42 Mich. 342.

the witness any questions which he considers necessary to elicit the whole truth, although questions asked by the judge may not assume a character which in the mouth of the counsel would be objectionable.

Where the witness is testifying, not as an expert, but as a witness to facts within his knowledge, he must confine his testimony to such facts, and not give opinions or inferences based upon such facts. The extent to which opinions are proper by an expert witness will receive attention under the proper head.

During the course of examination of the witness, the judge may, upon application of counsel, order all ordinary witnesses, except the one who is testifying and the parties themselves, to retire from the room, and the refusal of a witness to obey such an order of the judge will render him punishable for contempt of court. It has been attempted to apply this rule of exclusion to expert witnesses; but, as the value of the opinion of the expert is dependent upon the testimony given in court, and, as the reason for keeping him ignorant of the facts testified to by the other witnesses does not exist, the rule of exclusion is applied only to the extent of requiring him to withdraw while the other experts are delivering their opinions.

Where the testimony of the witness is given in response to questions, the law ordinarily requires that counsel shall so frame his questions as not to suggest the desired answer, in which case the question is said to be leading. This rule is, however, subject to many exceptions.

Cross-examination.

The witness having been sworn and having given evidence in behalf of one party, the other party is entitled to cross-examine him.

The scope of this cross-examination is a matter upon which the courts of different States differ. It was a rule in the English courts that a witness, having been sworn and examined by one party, became subject to cross-examination by the other party upon all matters relative to the case; this rule is also accepted by the courts

of several States. (*a*) The rule more generally adopted in the United States is that the counsel, in the cross-examination of the witness, will be limited to an inquiry into the facts and circumstances relating to the matter regarding which the witness testified upon his direct examination. (*b*)

Much latitude is, however, allowed by the trial judge in the cross-examination of witnesses, even in those States recognizing the rule that the cross-examination must be restricted to the matter brought out on the direct examination; thus it is permissible, where the witness has testified to only a portion of a material transaction or conversation, for the adverse party on cross-examination to bring out the details of the omitted portion, (*c*) and so may the witness be examined regarding matters the existence or truth of which may tend to show the improbability or falseness of statements made in the direct testimony. (*d*) But, it seems, the counsel for the defendant may not, in cross-examining his adversary's witness, enquire of matters which constitute an affirmative defense. (*e*)

The latitude allowable, and the extent to which cross-examination may be prolonged, is very largely a matter of discretion with the trial judge, and, as a corollary, it is the duty of the judge to protect the witness from unnecessary insinuations and attack of counsel. Mr. Justice Gary, in rendering the opinion in a case where cross-examination of an insulting character had been conducted, said:—

"The court, without objection from counsel of the appellant, should have stopped such an examination. . . . Witnesses should not be insulted

(*a*) Alabama. Huntsville &c R. Co. *v.* Corpening, 97 Ala. 681.
Arizona. Rush *v.* French, 1 Ariz. 99.
Georgia. News Pub. Co. *v.* Butler, 95 Ga. 659.
Massachusetts. Blackington *v.* Johnson, 126 Mass. 21.
Michigan. Hay *v.* Reid, 85 Mich. 296.
Missouri. Walter *v.* Hoeffner, 51 Mo. App. 46.
New York. Langley *v.* Wadsworth, 99 N. Y. 61.
South Carolina. Dillard *v.* Samuels, 25 So. Car. 318.
The extent of such examination is left to the discretion of the trial judge in Alabama, Massachusetts and New York.

(*b*) California. People *v.* Denby, 108 Cal. 54.
Connecticut. Russel *v.* Cruttenden, 53 Conn. 564.
Florida. Williams *v.* State, 32 Fla. 315.
Illinois. Poppers *v.* Meagher, 148 Ill. 192.
Iowa. Hall *v.* Rankin, 87 Ia. 261.
Kansas. Lawder *v.* Henderson, 36 Kan. 754.
Louisiana. State *v.* Taylor, 45 La. Ann. 1303.
Montana. McCormick *v.* Gliem, 13 Mont. 469.
Nebraska. Planck *v.* Bishop, 26 Neb. 589.
Oregon. Willis *v.* Lance, 28 Oregon, 371.
Pennsylvania. McNeal *v.* Pittsburgh &c R. Co., 131 Pa. St. 184.
South Dakota. Wendt *v.* Chi. &c R. Co., 4 S. Dak. 476.
Utah. People *v.* Thiede, 11 Utah, 241.
Vermont. Stiles *v.* Estabrook, 66 Ver. 535.
Washington. Patchen *v.* Parke &c Co., 6 Wash. 486.
Wisconsin. Perin *v.* State, 81 Wis. 135.
United States. N. P. Ry. Co. *v.* Urlin, 158 U. S. 271.

(*c*) Currier *v.* Robinson, 61 Ver. 196.

(*d*) Olson *v.* Peterson, 33 Neb. 358.

(*e*) Neil *v.* Thorn, 88 N. Y. 270.

when on the stand, nor should their examination be a contest of skill or nerves between witness and lawyer." (*a*)

Considerable latitude is allowed to counsed in cross-examining a witness to ascertain the extent of his knowledge as to matters testified to in the direct examination; also the means of knowledge and his interest in the subject of controversy. (*b*) And so, for the purpose of affecting the credibility of a witness, he may be asked, upon cross-examination, if he did not at a certain time and place make a certain statement to persons named, which is at variance with the direct testimony just given. (*c*) And for like reason he may be asked questions regarding his past life, and compelled to answer regarding acts of improper conduct or alleged crimes; the extent to which counsel will be permitted to go in such questioning is largely a matter within the discretion of the court. Hostility to the party against whom the witness is called may also be elicited upon cross-examination. (*d*)

After cross-examination, the party in whose behalf the witness is sworn may then re-examine him upon the matter referred to in the direct and cross-examination, for the purpose of explaining any apparent inconsistency or contradiction disclosed in the cross-examination. (*e*) The witness may not thereafter be cross-examined, unless, in the course of the re-examination, new matter is elicited which is material and relevant to the issue; and then only to the extent of such new matter. (*f*)

General Rule Governing the Admissibility of Evidence.

The question whether a given piece of evidence is admissible is often quite inexplicable to one not familiar with the rules of evidence, and doubtless the ruling of the court appears to him to be arbitrary or capricious. This, of course, is not so. The admissibility of evidence is regulated by rules well understood. It is true that the element of discretion which, under certain circumstances, is properly exercised by the court, while usually making for justice, tends in some slight degree to uncertainty, and that difficult and nice

(*a*) Chicago St. Ry. Co. *v.* Groshon, 61 Ill. App. 463.
(*b*) People *v.* Thompson, 92 Cal. 506; State *v.* Duffy, 57 Conn. 525; Blenkiron *v.* State, 40 Neb. 11.
(*c*) Cent. Ry. Co. *v.* Allmon, 147 Ill. 471.
(*d*) Drum et al. *v.* Harrison, 83 Ala. 384.
(*e*) People *v.* Mills, 94 Mich. 630.
(*f*) Wood *v.* McGuire, 17 Ga. 303.

questions are often raised in the application of these rules. A proper understanding of the subject of this brochure requires a general examination of many of the more important of these rules.

Things Judicially Taken Notice Of.

It is a well-recognized rule that in the trial of a case the court and jury must consider only those facts shown by competent and proper evidence. There are, however, some things so generally known and accepted that the courts will judicially take notice of them, when pertinent to the issue, without proof of their existence. Thus, the existence and titles of all other sovereign powers in the civilized world, their respective flags and seals of state; laws of nations; general customs and usages of merchants, these customs forming what is referred to in the law books as the "law merchant"; the seal of a notary public; movements of the astronomical bodies; coincidence of the days of the week with days of the month; legal weights and measures; meaning of words in the vernacular; matters of public history and public matters affecting the government; the geographical and civil divisions of the country into states, counties, towns, &c., although the exact geographical boundaries will not be so taken notice of unless defined by public statute; the principal officers of the government; all public proclamations of war and peace; public holidays and the like. All things coming within the general or specific description will be judicially recognized without proof. (*a*)

Burden of Proof on Party Having Affirmative of Issue.

The term "burden of proof" means the duty of proving the facts in dispute; this duty devolves upon the party who substantially asserts the affirmative of the issue. Greenleaf says:—

"This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable."(*b*)

The mere fact, however, that the facts are asserted in a negative form does not shift the burden from the party asserting them, but it is still incumbent upon him to prove them; but if the subject-

(*a*) Greenleaf on Evidence, Sec. 4 et seq. (*b*) Greenleaf on Evidence, Sec. 74.

matter of these negative averments is peculiarly within the knowledge of the adverse party, then slight evidence will be required to shift the burden of proof, and they will be taken to be true as averred until disproved. So, in case of the allegation of infancy, illegitimacy and insanity, the burden is upon the party asserting these negative facts.

Relevancy.

The question relating to the admissibility of evidence, which a judge is most frequently required to answer, is whether proffered evidence is relevant.

One fact is said to be relevant to another fact when the two are so related that one taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other fact. While facts may be relevant, yet they may be so remote that they are not properly admissible, one to prove the other. Thus, in an action for forcibly committing adultery upon plaintiff and giving her a veneeral disease, the evidence that some months before the alleged act of adultery the defendant slept one night at a house of ill fame may properly be excluded. (*a*) And so evidence of the condition of grantor's mind a year after making a deed may properly be excluded as too remote to show his mental capacity at the time of making such deed. (*b*)

All of the facts constituting part of the transaction in question are relevant, though they may not be in issue. This rule is so far-reaching that such facts are admissible, though they would ordinarily be objectionable as hearsay evidence; this character of evidence is said to be admissible as constituting part of the *res gestæ*. To illustrate: Upon a trial for murder, the witness reached the injured man twenty minutes after the injury was inflicted which resulted in his death and heard him say, "I'm stabbed; I'm gone; Dan Hacket stabbed me." It was held to be proper for the witness to recite this declaration, as it constituted part of the *res gestæ*. Also, in a prosecution for procuring an abortion, the witness was permitted to testify to conversations had with deceased on Wednesday and

(*a*) Morrisey *v.* Ingram, 111 Mass. 63. (*b*) White *v.* Graves, 107 Mass. 325.

Friday before the Saturday on which the operation was alleged to have been performed, in which conversations deceased stated that she had found out that she was in a family way; that she had been to see defendant about it; had been or was going to defendant to get some medicine or a syringe, and that she had made arrangements to have an operation performed on her by defendant, for which she was to pay twenty-five dollars; that she was going on Saturday to have instruments used to get rid of the child. All of this was held to be proper evidence, being part of the *res gestæ*. (*a*)

Where the question in issue is whether a certain act was done, any fact is relevant which shows motive for such act, or which shows a state of preparation or a mental attitude predisposed thereto. It accordingly is relevant to show, in case of a criminal prosecution for the procurement of an abortion, that defendant is possessed of an extraordinary number and variety of instruments for the producing of abortions; also that he has issued circulars calculated to show that he is prepared to procure abortions. (*b*)

It is also relevant, for the purpose of establishing a certain act, to show subsequent conduct of the person apparently influenced by the doing of that act, and any statements made in his presence and hearing by which his conduct is likely to have been affected; also to show any act done by the person in consequence of such act. Under this rule it would be permissible to introduce evidence of defendant's manner and conduct when arrested, also comments made upon such conduct by third persons in his presence and hearing; (*c*) any facts showing the relation or which offered an opportunity for the performance of the act in question. Accordingly, it is relevant to the question of whether defendant poisoned deceased, to show that defendant knew the habits of deceased, which afforded him an opportunity to administer the poison.

Facts unconnected with the fact in issue, though so similar to it as to render the fact in issue probable, are not generally admissible, although, as heretofore shown, such facts are sometimes relevant, as, when showing a state of preparation or of willingness to perform the act in question. Such facts are also relevant if they

(*a*) State *v.* Dickinson, 41 Wis. 299.
(*b*) Law in its Relations to Physicians. Ed. 1904, p. 457, et seq.
(*c*) People *v.* Ah Fook, 64 Cal. 380.

show the existence, on the occasion in question, of interest, knowledge, good or bad faith, or malice.

Competency of Evidence.

The term competency, when referring to evidence, relates to the legal fitness or character of the evidence offered, and has no bearing upon the subject-matter of the proof. It therefore follows that the subject-matter of proffered evidence may be relevant to the issue, and yet the particular evidence inadmissible because incompetent. This will be more apparent after examining the principal rules by which incompetent evidence is excluded.

One of the rules relating to the competency of evidence is that the best evidence of which the fact in its nature is susceptible is required. This rule simply means that if, for example, a document is to be proven, the original instrument, if obtainable, must be offered, and that copies or oral testimony of its contents will not be received. Mr Greenleaf succinctly states its meaning to be "that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had." (*a*)

If the "best evidence" is destroyed or beyond the reach of the party desiring to introduce it, he may then prove that fact and offer such evidence as will substitute best and most authentically the missing evidence. There are exceptions, modifications and relaxations of this rule, which, for the purpose of this brochure, it is unnecessary to consider.

Another important rule relating to the competency of evidence is that hearsay evidence is not admissible. This rule is based upon three very good reasons: (*1*) the person who made the assertion which is sought to be offered in court was not under oath when making such statement, and was, presumably, unmindful of the deep obligation with which a witness is impressed in court, to speak carefully and only to the extent of his knowledge; (*2*) the author of the statement is not before the jury, and they have no opportunity to judge of his truth and veracity and of his intelligence and ability to comprehend the subject in question; and (*3*) there is no opportunity for cross-examination of the author of the statement.

(*a*) Greenleaf on Evidence, Vol. 1, Sec. 82.

Like most well-founded rules, however, this one is subject to several well-recognized exceptions, some of which have been heretofore mentioned.

Among the exceptions to the rule against hearsay evidence are the following:

First. Admissions against interest, and their counterpart in criminal cases, confessions, are admissible. Confessions, to be admissible, however, must be voluntary, as distinguished from those induced by threat or promise by a person in authority. A confession not so induced is relevant, it seems, even though made under a promise of secrecy, or as a result of a deception practiced upon the party making it, or though made in a state of drunkenness, or in answer to questions which he was under no obligations to answer.

Second. Declarations by persons since deceased are relevant to show the existence of any public or general right or custom, or any matter of public or general interest, if such statement was made before the question relating to such matter arose.

Third. Testimony may be adduced of declarations relating to the existence of relationship or pedigree, or to the birth, marriage or death of any person by which such relationship was constituted, or as to the time or place of the occurrence of such an event. Evidence of such declarations is admissible, however, only where the fact to which such declarations relate is in issue, and where the declarations were made by one related to the person to whom the declaration referred, or by the husband or wife of such person, and where the declarations were made before the question had arisen in relation to which they are to be proven.

Fourth. Dying declarations as to the cause of death are also relevant. Declarations of this class are those made by one in danger of death, who has given up all hope of recovery, as to the cause or circumstances of the transaction which resulted in his death. Such declarations are relevant in trials for the murder of declarant.

Fifth. Matters and statements constituting part of the *res gestæ* are also competent, though they are within the strict construction of the rule against hearsay evidence.

The opinion of a witness as to a matter or fact in issue is also

incompetent, unless he is placed upon the stand as an expert and his qualification as such made to appear.

Privileged Communications.

Mention has been made of certain disqualifications applying peculiarly to physicians, clergymen and lawyers as witnesses. The extent and character of this disqualification as applied to his own work is important to be understood by the physician.

From time immemorial the law has, upon the grounds of public policy, considered certain matters sacred and has accordingly protected them from disclosure. Matters of this class are grouped under the four heads following: Political matters, such as state secrets, communications between heads of departments of state, etc.; judical matters, as, deliberations in the jury room, consultations of judges and the like; professional matters, as, communications between counsel and client; and social matters, as, communications of a confidential nature between husband and wife.

At common law the only professional matters which were protected were communications between counsel and client, so that whatever protection communications between physician and patient now enjoy must be found in the statutes of the particular State in which the communication takes place. (*a*)

Want of space prohibits an examination of these several acts; their effect in most States is, however, to place an effectual prohibition upon the disclosure upon the witness stand, by the physician, of any information communicated to him in a professional way. In some States the prohibition is expressly left to the discretion of the judge, and in some the privilege is waived whenever the patient voluntarily testifies regarding the subject-matter of the communication. (*b*)

The protection of these statutes may be invoked only by a licensed physician, (*c*) and then only where the relation of physician and patient exists. If, for instance, a physician calls upon one and examines

(*a*) Acts protecting such communications have been passed in the States of Arizona, California, Colorado, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, Wisconsin and Wyoming.

(*b*) A summary of the contents of these laws may be found in The Law in its Relations to Physicians, p. 489, *et seq.* Ed. of 1904, where the subject is quite fully treated.

(*c*) Wiel *v.* Cowles, 45 Hun, 307.

him for the purpose of information, and it is understood that such examination is for information and not for professional treatment, the information thereby obtained may be disclosed upon the witness stand; (*a*) but if, after making such examination, the physician undertakes the treatment of the case (*b*) or prescibes for the person, (*c*) the relation of physician and patient thereby arises and the physician becomes incapable of testifying to such information. And so, where a physician who had previously attended one called upon him to collect a bill for such former professional services, he was permitted to testify regarding what he observed while making such collection. (*d*)

The fact that a physician is employed by a third party or a public institution does not, in the absence of an express statutory modification of the rule, (*e*) prevent the operation of the statute. Thus, a jail physician is not permitted to testify regarding the physical condition of a prisoner whom he attended; (*f*) nor a hospital physician with regard to patients under his care; (*g*) nor a physician employed by one to attend his injured employes with regard to the condition of such employes. (*h*)

The protection of the statute is also extended to information obtained by a consultant in consultation, (*i*) and to information imparted by a physician to his partner in consultation. (*j*)

Information obtained by a physician in performing an autopsy does not, it is held, come within the protection of the statute. (*k*)

These statutes are manifestly not intended to disqualify the physician from testifying as to all matters between himself and patient, for a physician may state that he is the family physician of a certain patient and may give the number and dates of his visits, (*l*) and the date upon which he discharged the patient; (*m*) but how far he may go in his disclosures without running counter to these statutes is a nice question, and one upon which the courts are not always in harmony in the application of similar acts.

(*a*) Nesbit *v.* People, 19 Colo. 441.
(*b*) Weitz *v.* Mound City Ry. Co., 53 Mo. App. 39.
(*c*) Freel *v.* Market St. Ry. Co., 97 Cal. 40.
(*d*) Bower *v.* Bower, 142 Ind. 194.
(*e*) See Code of Civil Procedure, N. Y. Sec. 836.
(*f*) People *v.* Schuyler, 106 N. Y. 298.
(*g*) Grossman *v.* Supreme Lodge of K. & L. of Honor, 6 N. Y. Supp. 821.
(*h*) Colo. Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541.
(*i*) Renihan *v.* Dennin, 103 N. Y. 573.
(*j*) Ætna Life Ins. Co. *v.* Deming, 123 Ind. 384.
(*k*) Harrison *v.* Sutter St. Ry. Co., 116 Cal. 156.
(*l*) Briesenmeister *v.* K. of P. 81 Mich. 525; Patten *v.* U. L. & A. Ins. Assn. 133 N. Y. 450.
(*m*) Dittrich *v.* Detroit, 98 Mich. 245.

The acts of the different States differ somewhat in their expression. The words of the act of New York describing the matter protected are: "any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." (*a*) Most of the other States have adopted these same words, or words to the same general effect. These words are construed by the courts to include not only information communicated by the patient to the physician by word of mouth, but information regarding the patient's condition which he may otherwise obtain. Mr. Justice Miller, in expressing his view of the meaning of this statute said:—

"When it speaks of information, it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms." (*b*)

The States of Indiana, Iowa, Nebraska, Ohio and Wyoming have not followed the words of the New York act, but have provided that physicians shall not disclose matter "communicated" to them by their patients, or shall not disclose any "communication," etc. While it would seem at first glance these acts were intended to protect only such matter as was communicated to the physician by statement of the patient, yet, it seems, the legislature, in making use of the expression employed, intended no other effect than that of the New York act—at least, so it has been held by the courts of Indiana (*c*) and Iowa. (*d*)

The limitation that the information shall be "necessary to enable him to act in that capacity" has given rise to some conflict of authority. One line of decisions has been rendered holding that the information to be protected must have a direct bearing upon the condition for which the physician is attending the patient; that information as to the time of receiving a rupture for which the physician was treating the patient was not "necessary to enable" him to act for the patient; (*e*) that the obvious objective appearance of the patient, the inflamed face, the blood-shot eye, the fumes of alcohol, did not constitute information of the character protected by the statute. (*f*) The other and later line of decisions, which, it

(*a*) Code of Civil Procedure, Sec. 834.
(*b*) Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185.
(*c*) Williams *v.* Johnson, 112 Ind. 273.
(*d*) Prader *v.* Accident Assn., 95 Ia. 149.
(*e*) Campau *v.* North, 39 Mich. 606.
(*f*) Linz *v.* Mass. Mut. Life Ins. Co., 8 Mo. App. 363.

seems, represents the true doctrine, gives to the act a broad and liberal construction, and protects all information which necessarily comes to the physician in the course of his professional intercourse with the patient. The appearance of intoxication; the presence of scars, defects, or marks of a loathsome disease appearing on a limb or member of the body, disclosed upon baring such limb or member for professional treatment; (*a*) statements as to how the accident occurred which caused the injury for which the patient is treated—at least when such statements are elicited by the physician for the purpose of ascertaining the character or extent of the injury; (*b*) and statements by patients as to their condition of health prior to the time of rendering the professional services; (*c*) all such information is considered as coming within the protection of the statute. In fact, the courts in some cases have gone farther than this in protecting information obtained by physicians while professionally attending patients. In a case where the physician attempted to disclose a statement made by the patient as to how he received the injury for which the physician attended him, the physician declaring that he elicited the information, not for the purpose of diagnosis, but of determining whether the railroad company was to blame, the court held such testimony inadmissible, and, quite justly it seems, rebuked the physician for taking advantage of his professional relation to obtain information with which he had no professional concern. (*d*)

The question whether the statute precludes a physician from testifying to the testamentary capacity of a deceased patient, upon proceedings for the probate of his will, has been the subject of much conflict and uncertainty; it was finally settled, in New York, that such testimony is precluded. In order to overcome this sweeping disqualification in testamentary cases, the Legislature of New York, in 1892, (*e*) provided that, in case the validity of the last will and testament of a deceased patient was in question, the privilege might be waived by the executor named in the will, or the surviving husband, widow, or any heir-at-law or next-of-kin, or any other

(*a*) Kling *v.* City of Kansas, 27 Mo. App. 231.
(*b*) Raymond *v.* B. C. R. & N. Ry. Co., 65 Ia. 152.
(*c*) Barker *v.* Cunard Steamship Co., 91 Hun, 495.
(*d*) The Penn. Co. *v.* Marion, 123 Ind. 415.
(*e*) L. 1892, p. 1042, c. 514.

party in interest, provided that such waiver should not authorize the disclosure of confidential communications, or would not tend to disgrace the memory of the patient.

As against the New York decision, it is held in Indiana, (*a*) Iowa, (*b*) Michigan (*c*) and Missouri, (*d*) that the physician may be called by the executor or personal representative of deceased to testify to his mental condition, as the executor or personal representative has power to waive the privilege. These decisions doubtless present the better doctrine and the one which will be accepted in those States where the question will be decided *de novo.*

It has been held by the Supreme Courts of California and Wisconsin, and upon very good reason, that when a patient invites his attending physician to affix his name as attesting witness to his will, he thereby waives the privilege which would otherwise seal the physician's lips as to information affecting the validity of the will and invites a full disclosure. (*e*)

Whether a physician may testify at an inquisition of lunacy as to his patient's condition, such information having been obtained while attending him professionally, may well be doubted.

In several of the States having statutes protecting professional communications, the protection is expressly limited to civil matters, so that the physician may be required to testify in criminal proceedings. In those States where the privilege is not so limited the question of the application of the statute in criminal matters has been variously decided, some decisions holding that it does apply, and some that the protection sought is not within the purview of the act. This apparent conflict of authority has been harmonized and the decision classified under the three heads following: (*f*)

First. "Communications had for the purpose of doing an unlawful act or committing a crime are not within the meaning of the law, and will not be protected." Under this head come such matters as consultations for the purpose of the unlawful procuring of an abortion.

Second. When the physician is being prosecuted for the murder of his patient, or for the commission of a crime committed by him

(*a*) Morris *v.* Morris, 119 Ind. 341.
(*b*) Denning *v.* Butcher, 91 Ia. 425.
(*c*) Fraser *v.* Jennison, 42 Mich. 206.
(*d*) Thompson *v.* Ish, 99 Mo. 160.
(*e*) Re Mullins Est., 110 Cal. 252; McMaster *v.* Scriven, 85 Wis. 162.
(*f*) The Law in its Relation to Physicians, 522, Ed. 1904.

upon his patient, then the matters between the accused and the patient are not privileged.

Third. "In ordinary criminal actions the privilege applies equally as in civil matters." This third class is illustrated by the case where the district attorney sent a physician to attend upon a girl upon whom a criminal abortion had been performed; upon trial, the district attorney attempted to prove the girl's condition by testimony of the physician whom he had sent to attend her, but the physician was not permitted to disclose the information thereby obtained. (*a*)

The privilege granted by these statutes belongs to the patient, and, therefore, it has been held, may be waived by the patient only. (*b*) So, where one who held an insurance policy which contained a provision rendering it void in case of suicide, came to his death by his own act, it became pertinent to show that deceased was insane or unconscious of performing the act which caused his death. To prove this fact the deceased's physician was called to testify, but the court held that the right of waiving the privilege belonged to the patient alone, and that, as the patient was dead, the privilege could not be waived. (*c*)

This rule has been modified in New York by the passage of the statute heretofore referred to, which authorizes the waiver by personal representatives of deceased. (*d*)

The question of whether or not certain acts constitute a waiver has been many times before the court, with results not infrequently quite conflicting. There seems to be no conflict upon the proposition that where a patient calls a physician to testify he waives the privilege, (*e*) and it is quite well established that the effect is the same where the physician is called by the patient's adversary and permitted to testify without objection by the patient; (*f*) also that the patient, by instituting a criminal prosecution, waives the privilege as to matters upon which such a proceeding is based. (*g*) Whether the patient waives the privilege when he takes the stand himself and testifies as to his health, is a question upon which the authorities

(*a*) People *v.* Murphy, 101 N. Y. 126.
(*b*) Loder *v.* Whelpley, 111 N. Y. 239.
(*c*) Loder *v.* Whelpley, *supra.*
(*d*) L. 1892, c. 514.
(*e*) Squires *v.* City etc., 89 Mo. 226; Alberti *v.* N. Y. L. E. & W. R. Co., 118 N. Y. 77.
(*f*) Hoyt *v.* Hoyt, 112 N. Y. 493; Lincoln *v.* City etc., 101 Mich. 245; Wheelock *v.* Godfrey, 100 Cal. 578.
(*g*) State *v.* Depositer, 21 Nev. 107.

are in conflict. In some States the statutes are so worded as to give to such acts the effect of a waiver. In New York it is held that such conduct on the part of the patient amounts to a waiver, (*a*) while in Iowa the opposite view is held. (*b*) Testimony by a patient as to his condition at a certain time will not amount to a waiver authorizing the disclosure by the physician of the patient's condition at another time. (*c*) Accordingly, where several physicians attend a patient at different times and one physician is called to testify to the patient's condition during the time of his treatment, the privilege is not thereby waived as to the other physicians; (*d*) but whether a patient, by calling one of several physicians who have attended him at the same time as a witness, thereby waives the privilege as to the others, is not so clear. The Court of Appeals of New York has held that such an act is a waiver as to all, (*e*) while the Supreme Court of Iowa entertains the opposite view. (*f*)

Where a patient sues his physician for malpractice, it seems clear that he thereby waives his privilege as to the subject-matter of the suit. It has been so held in Indiana, (*g*) and the Supreme Court of New York has clearly expressed this view, although such expression was made under circumstances whereby it amounted only to a dictum. (*h*) But the same proper and just result does not follow where the physician sues the patient to recover fees and the patient interposes a general denial, thus placing upon the physician the burden of proving the services rendered; such plea should amount to a waiver, enabling the physician to testify to the services, but it is held that it does not. (*i*) If, however, the witness is skillfully handled and all evidence admissible is introduced, the burden may be shifted to the patient to disprove the value of the services claimed.

Whether the patient, having once waived the privilege, may ever again assert it, is also a question upon which there is conflict of authority; the later view, expressed upon the subject by the Court of Appeals of New York, being that the privilege could never again

(*a*) Treanor *v.* Manhattan Ry. Co., 28 Abb. N. C. 47.
(*b*) McConnell *v.* City of Osage, 80 Ia. 293.
(*c*) Butler *v.* Manhattan Ry. Co., 23 N. Y. Supp. 163.
(*d*) Hope *v.* Troy & L. R. Co., 40 Hun, 438.
(*e*) Morris *v.* N. Y. O. & W. R. Co., 148 N. Y. 88.
(*f*) Baxter *v.* City of Cedar Rapids, 103 Ia. 599.
(*g*) Becknell *v.* Hosier, 10 Ind. App. 5.
(*h*) McGillicudy *v.* Farmers L. & T. Co., 26 Misc. 55; Van Allen *v.* Gordon, 83 Hun, 379.
(*i*) Van Allen *v.* Gordon, *supra*.

be asserted. (*a*) On the other hand, the Supreme Court of Michigan expresses its preference of the opposite rule, laid down by an earlier case decided in New York, (*b*) and, accordingly, holds that the privilege, having once been waived, may be again asserted upon a subsequent trial of the case. (*c*)

Expert Evidence.

It has been shown that, as a general rule, opinions are incompetent, and that the witness will not be permitted to express them in testifying. This rule is subject to certain exceptions, one of which is particularly important and includes all of that class of evidence known as expert.

This class of evidence, falling under the head of an exception, is admissible in a certain class of cases only; that is, in those cases where the subject-matter of the issue involves questions outside of the range of ordinary knowledge and experience, and where one without particular experience or study would be incapable of forming a correct judgment thereon. The opinions of an expert witness are admissible, to use the words of Mr. Chief Justice Shaw, "because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enables him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." (*d*)

Whenever the physical condition of one becomes pertinent in any suit, it will be perceived that the facts presented will probably be such that questions will arise which the jury will be incapable of comprehending, and that the assistance of a physician will be proper, if not necessary, to their comprehension.

The evidence of medical experts has constituted a very important branch of expert evidence; in fact, it seems that the earliest recorded instances of the giving of this class of evidence were those where medical expert evidence was produced. About the middle of the fourteenth century, a case is reported in England where, after failure of the justices to determine from inspection whether an injury constituted mayhem, called to their assistance surgeons from London

(*a*) McKinney *v.* Grand St. etc. R. R. Co., 104 N. Y. 352.
(*b*) Grattan *v.* Ins. Co., 92 N. Y. 274.
(*c*) Breisenmeister *v.* K. of P., 81 Mich. 525.
(*d*) N. E. Glass Co. *v.* Lovell, 7 Cush. 319.

"ad informand dominum regem et cur." (*a*) From that time to the present the medical expert has probably assisted the judge and jury more frequently to an understanding of technical matters before them than any other class of expert witness.

It will be readily understood, from the peculiar character of expert evidence, that, before giving such evidence, one must show the qualifications which peculiarly fit him to pass upon the matters in question. The determination of this qualification is for the court.

The preliminary questions asked for the purpose of showing the qualification of the proffered witness need not ordinarily be exhaustive or searching. If, however, the court is not satisfied with counsel's questions, he has the right to ask additional questions and even to examine other witnesses to obtain such additional light upon the qualification of the proffered witness as he deems necessary or pertinent. (*b*) Upon the preliminary examination, a statement by the proffered witness that he considers himself qualified to give an opinion as an expert is irrelevant and improper. (*c*)

One's qualification as an expert may be based either upon study and reading, or upon scientific research regarding the particular subject-matter, where such matter is within his profession or calling, or it may be based upon practice and experience within the line of one's work or profession. Thus it has been held, on the one hand, that a physician was qualified as a medical expert where he testified that his knowledge of the subject-matter in question was derived from reading and studying medical authorities and not from experience and actual observation; (*d*) on the other hand, it has been held that a midwife was competent to express an opinion as to whether an infant was of premature birth, the qualification of this witness being based upon practice and experience only. (*e*)

The question of whether or not a proffered witness is qualified as an expert is, to a considerable degree, left to the discretion of the court, and it is a sound exercise of such discretion for the court to permit the general practitioner who attended the injured patient to testify as an expert as to the cause of the injury to the patient's eyes, though the physician was neither a surgeon nor an oculist. (*f*)

(*a*) Liber Assize (28 Edw. III.) 145. pl. 5.
(*b*) Laros *v.* Commonwealth, 84 Pa. St. 200.
(*c*) Naughton *v.* Stagg, 4 Mo. App. 271.
(*d*) Rogers on Expert Testimony, 47.
(*e*) Mason *v.* Fuller, 45 Vt. 29.
(*f*) Castner *v.* Sliker, 33 N. J. Law, 95.

The opposing counsel may pursue either of two methods, where he thinks the witness unqualified; he may object to the proposed testimony being given on the ground that the proffered witness does not possess the necessary qualifications as an expert, and ask for and obtain a ruling of the court upon the subject, with a view to preventing the witness from testifying; or he may permit the witness to testify, and endeavor, upon the cross-examination, to show that the witness does not properly or fully understand the subject and thereby discredit his testimony with the jury. In pursuance of this latter method of attack, it has been held that where the witness, who had attended deceased, testified that in his opinion the case was one of arsenical poisoning, it was proper for the opposing counsel, upon cross-examination, to ask him if he treated the case as one of arsenical poisoning. (*a*)

Where opposing counsel seeks to discredit the testimony of a witness by introducing an expert whose opinions are at variance with those of the witness, he may not ask such expert the question whether he concurs with the statements made by the former witness, and, if not, to state wherein he differs, as such a course of questioning would be unfair both to the witness sought to be discredited and the party in whose behalf he had testified; but such expert will be required to give his opinion upon the facts involved, unconnected with and independent of the opinion already given. (*b*)

Expert, How to Testify.

The first and most important principle governing the production of opinion evidence is that the witness must so testify as not to assume or trespass upon the functions of the jury. That is, the question upon which the witness is asked to give his opinion must not be the identical question which it is the duty of the jury to determine. Thus, in a murder trial, where the question in issue is whether or not the accused was insane, it would be manifestly improper for an expert to answer the question whether in his judgment, based upon all the testimony given in the case, the accused was sane or insane. (*c*) Such a question imposes upon the witness the duty of recalling all

(*a*) Epps *v.* State, 102 Ind. 539.
(*b*) Horne *v.* Williams, 12 Ind. 324.
(*c*) People *v.* McElvaine, 121 N. Y. 250.

of the evidence given, passing upon its weight and determining its truth, and, in short, of answering the very question which it is the sworn duty of the jury to answer. For a like reason, it is improper that the expert witness should express his opinion as to the amount of compensation to which one who has been injured is entitled. (*a*)

But what form must the question take to be free from this fatal objection?

The proper method of asking for the opinion of the expert witness without requiring him to pass upon any of the facts which it is the duty of the jury to determine, is to so state the question that the truth of the evidence upon which the party relies is assumed. Thus, if the counsel, instead of asking the expert for his opinion based upon all the evidence given in the case, asks him for his opinion based upon the evidence given for the party in whose behalf he is called, assuming that such evidence is true, it is apparent that there is no clashing of functions. The jury has still the facts to determine from the evidence, and having determined that the hypothesis upon which the expert's opinion is given is true, it may then avail itself of the scientific information based upon those facts which it has received.

According to the best practice, the counsel does not stop with a general hypothetical reference to the statements of certain witnesses, but carefully frames his question, setting forth, hypothetically, all of the facts upon which he wishes the opinion to be based, which usually includes all of the facts in his theory of the case. In this form of questioning it affirmatively appears upon what facts and considerations the opinion of the expert is based, while in cases where the reference to testimony given is general, certain statements may have escaped the recollection of the expert; or, on the other hand, if the case is complicated, he may have confused the testimony given and based his opinion upon certain statements not intended by counsel and inconsistent with the theory of the case upon which he is testifying.

The theory of the hypothetical question is that it contains all of the facts, or, at least, all of the essential facts of the case. There-

(*a*) M. H. C. & C. Turnpike Co. *v.* Maupin, 79 Ky. 101.

fore, if, in examining the expert witness, a hypothetical question is asked containing assumed facts which, as the case proceeds, it is apparent there is no evidence to support, it is proper that the court should instruct the jury to disregard the opinion based upon such hypothetical question. Likewise, in a case where the jury finds from the evidence that the hypothetical question does not correctly or fully state the facts, they should disregard the opinion, "because," said the trial judge, in charging the jury, "if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, then the opinion of the doctor would be valueless. He gives his opinion upon a certain state of facts supposed to be true, and we don't know what his opinion would be if one of those facts were withdrawn." (*a*)

It is not in all cases, however, that the witness must testify upon a hypothetical statement of facts. If the physician has attended the patient and understands his condition, he is a proper witness to state such facts and conditions, and, having stated them to the jury, he may then express his opinion as an expert, based upon such facts and conditions. Mr. Justice Barrett, of the Appellate Division of the Supreme Court, in commenting upon the fact that a hypothetical question under such circumstances was unnecessary, said :—

"One of the purposes of an hypothetical question is to prevent the expert from giving his opinion upon facts known to himself or mentally assumed by him, but not communicated to the jury. Here the expert's opinion was given upon the exact physical condition which he had observed and described. He emphasized this observation and description throughout. The jury had heard every fact upon which the opinion was based. The opinion was not based upon other testimony in the case, nor upon hearsay, nor upon any foreign assumption. It was strictly limited to deductions from the physical condition which the expert had personally observed, and which, as a witness, he had fully described. Under these circumstances it was not necessary to group the facts thus narrated into the form of an hypothesis. That would have been idle ceremony. It was clearly competent for the same person, as an expert, to give his opinion upon the facts, which, as a physician, he had observed and narrated." (*b*)

The opinion of Justice Barrett makes clear the reason for the rule that it is not proper practice to ask the witness for an opinion upon the condition of the patient, without his having first testified

(*a*) People *v.* Foley, 64 Mich. 148.

(*b*) Niendorff *v.* Manhattan R. Co., 4 App. Div. 46.

to the facts which he found present upon examination. Accordingly it is not good practice to call a physician and ask him "whether a person was in good health and free from any symptom of disease" without having first given him an opportunity to state facts upon which such a conclusion might be based. (*a*) In short, the opinion of the expert must be based upon facts or statements appearing in evidence in the case. This statement is, perhaps, subject to an exception, in that it is proper for the expert to express an opinion based upon statements and expressions of the patient made at the time of the examination. The extent to which this rule is applicable is the subject of some conflict, the courts of some States holding that where the examination is made after suit is commenced, not for the purpose of treatment, but merely for the purpose of information, exclamations of pain are properly excluded. (*b*)

It will be readily perceived that an urgent reason for the foregoing rules is that the court and jury may know the grounds and reasons upon which the expert's opinion is based, and, apparently, that the urgency of this reason may not be lost sight of, it is a recognized rule that either party may ask the expert the reasons upon which his opinion is based, or the expert himself may, with the permission of the court, give such reasons and explanations unasked by counsel.

The following general rules governing the examination of expert witnesses have been laid down by Mr. Rogers in his excellent work upon the subject of Expert Testimony :— (*c*)

First. "Evidence should be confined to the points in issue, and evidence of collateral facts which are incapable of affording any reasonable presumpton as to the principal matter in dispute should not be received."

Second. "Leading questions should not be asked on the direct, but may be asked on the cross-examination of a witness." This is subject to exception where the subject-matter of the evidence is complicated, and does not apply when the witness is hostile.

Third. "In England the rule is that the examination and cross-examination of a witness must relate to the facts in issue, or relevant

(*a*) Reid *v.* Piedmont etc. Life Ins. Co., 58 Mo. 425.

(*b*) Grand Rapids etc. R. R. Co. *v.* Huntley, 38 Mich. 537; Darrington *v.* N. Y. etc. Co., 52 Conn. 285.

(*c*) Rogers on Expert Testimony, 87.

or deemed to be relevant thereto, while the re-examination must be directed to an explanation of the matters referred to in the cross-examination. But in this country the weight of authority is in favor of confining the cross-examination of the witness to the facts testified to in chief. The English rule has been substantially adopted in Massachusetts and a few other American States. (*a*) In Michigan the English rule has been acted on in practice, and the rulings of the Supreme Court of that State are as liberal as those of the Supreme Court of Massachusetts on the same subject."

Fourth. "On the cross-examination, a witness may be asked any question tending (1) to test his accuracy, veracity and credibility, or (2) to shake his credit by injuring his character. And he may be compelled to answer the same, unless such answer would tend to criminate himself."

Fifth. "If, on cross-examination, a witness is asked a question which is irrelevant only in that it may tend to shake his credit by injuring his character, his answer cannot be contradicted unless, (1) he has denied facts tending to show that he is not impartial, or (2) he has been asked and has denied or refused to answer whether he has been convicted of some criminal offence."

Sixth. "On cross-examination, a witness may be asked as to any former statements which he may have made, and which are inconsistent with his present testimony. If he denies having made them, they may be proven against him."

Seventh. "The court, in its discretion, may permit a witness to be recalled for further examination. If permission is granted for further examination-in-chief, or further cross-examination, the parties have the right of further cross-examination and of further re-examination respectively."

Eighth. "A party is entitled to the cross-examination of a witness who has been (1) examined-in-chief, or, (2) according to the English rule, if he has been intentionally sworn."

Scope and Character of Evidence Receivable.

The opinions of the expert which are properly receivable as evidence, whether based upon facts known to him and testified to in

(*a*) Massachusetts, Vermont, Missouri and South Carolina.

court, or whether reached from the consideration of hypothetical questions, are about as varied and extensive in their scope as the field of medical knowledge; in short, such opinions may include everything upon which the physician as a scientific man, as distinguished from a man of ordinary sound judgment, is entitled to pass.

The physician testifying as an expert may give his opinion as to the cause of death; what symptoms would indicate death from a particular cause; whether a clot of blood such as had been found could have existed twelve hours without causing death, and, where several concurrent causes appear, from either of which death might have resulted, he may state which cause produced the death. As, that death came from bruises and lacerations, and not from dislocation of the vertebræ. Where the witness testified that he found upon the right side of the head of deceased, just above the temple bone, a severe contused wound about six inches in length, and from about one and a half to two and a half inches in width, to the skull; that the skull was not fractured, and he discovered no injury to it; that he did not open the head or examine the brain; that such a wound as that upon the head of deceased might produce death, and frequently did, and that, in his opinion, said wound did cause the death of the deceased by concussion of the brain. Mr. Chief Justice English, in referring to this testimony, said: "From the examination which he made, his observation, experience and professional reading, he formed the opinion that the wound caused the death; and we are aware of no law that required him to open the skull and examine the brain before he could be permitted to express such opinion to the jury." (*a*)

It is proper for the expert to be asked the question: "Supposing a person to have fallen and been stunned in shallow water, where he made very little struggle, state whether what you found to be the condition of the lungs would be what would be expected where a man came to his death in that manner." (*b*)

A physician may give his opinion as to whether a still-born child would have been born alive if medical assistance had been

(*a*) Ebos *v.* State, 34 Ark. 520.

(*b*) Manufacturer's Accident Indemnity Co. *v.* Dorgan, 58 Fed. Rep. 945.

rendered in time. (*a*) He may state the cause, in his opinion, of a miscarriage, that it was due to injuries received in a collision of street railway cars; (*b*) that it is due to mistreatment by a sleeping car porter in failing to awaken the passenger in time to enable her to dress and prepare to leave the train properly clad, and in hurrying her from the car unclothed and unprotected from the inclemencies of the weather, such treatment of the party having been shown to have shortly preceded the miscarriage; (*c*) that it is due to a fall from a sleigh, shown to have occurred three or four days prior to the birth, following which fall the patient suffered pains in the back that continued until the birth; (*d*) that it is due to mechanical means, (*e*) and whether such mechanical means were self-inflicted. (*f*)

The physician may give his opinion, based upon present symptoms, as to the length of time which a disease has existed; (*g*) he may also testify as to whether, in his opinion, a disease is curable. (*h*)

The physician may, within certain limits, give his opinion as to the cause of certain injuries or wounds. The extent to which such opinions are allowable is illustrated in the following cases:—

In Matteson *v.* N. Y. Cent. R. R. Co., (*i*) a Mrs. M. was injured in a railway accident on July 7th, 1859. Dr. P. testified, upon the trial, that he first knew Mrs. M. eight or nine years before the trial, but had not seen her from that time until the 1st of October following the accident; that he examined her thoroughly then, and later in February, and again in June, and he saw her two or three times during the week before the trial, which took place about fifteen months after the accident. Upon the trial, the following questions were put and answers given: "Suppose Mrs. M. in good health on the 7th of July, and then in the condition you find her in October, would a sudden jar account for her symptoms?" ANSWER: "I don't know of anything that would be as likely to account for it as that." QUESTION: "If well on the 7th of July, without an accident, would the occurrence of disease between

(*a*) Telegraph Co. *v.* Cooper, 71 Tex. 507.
(*b*) Howland *v.* Oakland, C. St. R. Co., 110 Cal. 513.
(*c*) McKeon *v.* C. M. & St. P. R. Co., 94 Wis. 477.
(*d*) State *v.* Ginger, 80 Ia. 574.
(*e*) Hauk *v.* State, 148 Ind. 259.
(*f*) State *v.* Lee, 65 Conn. 280.
(*g*) Eckles *v.* Bates, 26 Ala. 655.
(*h*) N. Y. Electric Equipment Co. *v.* Blair, 79 Fed. Rep. 896.
(*i*) Matteson *v.* N. Y. Cent. R. R. Co., 35 N. Y. 487.

these periods account for her condition?" ANSWER: "I think it would not." This evidence was held to be competent and proper. Again, in the same case, the testimony of Dr. B. was held to be competent which was to the effect that he had visited Mrs. M. three days after the accident and daily thereafter for several weeks; that at his first visit, her pulse was very small and frequent; that she complained of pains in her head, back and limbs; that her breathing was not natural; that she complained of numbness in her limbs and inability to use them, indicating a tendency to paralysis; that these symptoms afterward increased and continued to the time of the trial; that he thought her difficulty was an injury to the spinal colum, which, he said, may be produced by a severe jar in any form, and that, in his opinion, it was produced by violence, and would be permanent.

In the case of Robinson *v.* Marino, (*a*) a physician who had examined wounds caused by a dog-bite was asked: "From your knowledge as a surgeon and general practitioner, can you tell what the probable cause of those wounds was?" This was held to have been a proper question.

In a Wisconsin case (*b*) it was held proper for the physician to testify that, in his opinion, the plaintiff's condition as he found it could have been produced by a wire heavily charged with electricity.

In a Texas case (*c*) a physician was asked: "Please state your opinion on the following case: Suppose a woman of the size and weight of Mrs. B. should be sitting in a railway passenger coach which is in motion, and another train, which is moving at right angles with, or nearly at right angles with, the train in which she is traveling, should come in collision with her train and knock the locomotive of the train of which her coach is a part off the track, and should jerk and jar the coach in which she is sitting sufficiently to throw her from her seat, would such a force be sufficient to cause, and would it probably cause, the injuries which you have described in the case of Mrs. B.?" This was held to be a proper question to be answered by a physician who knew Mrs. B.'s condition.

So was the following question and answer held to be competent: "Now, taking the injury as you find it there, and taking your

(*a*) Robinson *v.* Marino, 3 Wash. 434.
(*b*) Block *v.* Milwaukee St. R. Co., 89 Wis. 371.
(*c*) Texas Cent. R. Co. *v.* Burnett, 80 Tex. 536.

experience as a physician and surgeon of eleven years' standing, what would probably cause such an injury as you found the child suffering with when she came to see you?" To which the physician answered: "A severe strain would be the result of an injury of that kind, that she was suffering from; it would be produced by it." (*a*)

The testimony given by a physician who treated plaintiff's knee, to the effect that the condition of the knee when he first examined it could have been produced by a fall or external injury, was proper. (*b*)

The Supreme Court of Massachusetts held that a question was entitled to answer the substance of which was that, if an eye was inflamed violently for two weeks, and caustic soda had got into it two months before, and there had never been any trouble with the eye up to that time, what he would consider the cause. Mr. Justice Holmes said: "The question was well enough, although, to be instructive, it would have been proper to add to the hypothesis that the inflammation had begun immediately after the soda had got into the eye, that being the testimony in the case." (*c*)

It is proper for the expert to be asked the question: "Could the injuries have been caused, as a whole, by a fall through a hole in the sidewalk?" (*d*)

It has been held that a physician should be permitted to give his opinion as to whether a person had been exposed to small-pox. This question arose in a case based upon false imprisonment of the plaintiff by the commissioner of health of the City of Brooklyn, who caused the plaintiff to be quarantined for refusing to be vaccinated. Under the law the defendant, as commissioner, was invested with the power to quarantine "persons and things infected with or exposed to such diseases." There was no direct evidence that the plaintiff had been exposed to the disease. Upon trial, defendant gave evidence as to the extent of the disease in the portion of the city in which plaintiff was engaged in business, that some of plaintiff's employees had been in proximity to places where persons had been infected, and in the presence of inmates of houses where the disease existed. The defendant offered to prove the number of

(*a*) The Pennsylvania Co. *v.* Frund, 4 Ind. App. 470.
(*b*) Village of Chatsworth *v.* Rowe, 166 Ill. 114.
(*c*) Flaherty *v.* Powers, 167 Mass. 61.
(*d*) Smalley *v.* City of Appleton, 75 Wis. 18.

cases existing in the locality for a period of three months, during a portion of which plaintiff had been quarantined, and to introduce a map, showing the locality of those cases; he also offered to prove by a physician the infectious and contagious character of small-pox, how the contagion of the disease is conveyed; that it is conveyed in the air and absorbed in the respiratory tract; conveyed in clothing and utensils, and by atmospheric contagion; and how long the poison of the disease retains its vitality. This evidence was offered with a view to putting a hypothetical question to the witness, calling for his opinion as to whether, upon the state of facts proven and attempted to be proven, the plaintiff had been exposed to the small-pox. The Appellate Division, Second Department, held that these questions were proper and that the witness should have been permitted to give his opinion upon the hypothetical presentation of facts. (*a*)

The witness should not assume to ascribe with too great particularity the cause of the injury. An amusing instance of a case of such misdirected zeal is reported in Alabama, where a physician upon deposition said: "My opinion is, that said injuries were caused by a fall from a mule or a horse falling through a crossing on the railroad at Cedar crossing." Mr. Justice Somerville, in criticizing this answer, said: "It was competent for the witness, Dr. S., to give his opinion, as an expert, that the injuries to the plaintiff, Mrs. P., were caused by a fall of some kind, but not by a fall from a mule or a horse at a particular crossing, as to the facts of which he neither knew nor pretended to know anything. The evidence bearing on this point was properly excluded." (*b*)

The principle that the question must be so framed as not to cause the physician to trespass upon the province of the jury must always be carefully considered in determining the character of testimony which may be elicited. The courts of some States have shown a disposition to go to a greater length in excluding the testimony of the physician on this ground than it would seem a proper application of the principle would justify.

In Michigan it has been held that an objection was properly

(*a*) Smith *v.* Emery, 11 App. Div. 10.

(*b*) Patterson *v.* S. & N. Ala. R. R. Co., 89 Ala. 318.

taken to the question, "From the appearance of the wound, what would you say it was caused by?" Mr. Justice Sherwood said: "The question calls for the fact which was to be found by the jury. What *might* have caused it would have been proper, but what did cause it was the real question for the jury." (*a*)

The Supreme Court of Iowa has gone so far as to hold that the question how the wounds in question were *probably* made, called for "an expression of opinion based upon matters which were to be weighed and considered by the jury, and determined by the exercise of their own judgments, and not upon the opinion of another." (*b*) It would seem to require but slight extension of this application of the principle to materially abridge the scope of the expert's functions.

In a later case, decided by the Supreme Court of Michigan, the counsel, after asking a long hypothetical question setting forth the circumstances and conditions upon which he relied, put this further question: "Taking into consideration simply these things that were asked you on this question, to what would you attribute the condition that you found the patient in at the time of your examination?" To this the physician answered: "Why, it seems to me there could be but one conclusion, knowing the history of the case and all, . . . that it resulted from the fall. It doesn't take a medical expert to answer that question, does it?" "This," said Mr. Justice Champlin, "was improper. It was usurping the province of the jury." (*c*)

Less than a year later the same court marked the limitation of the principle laid down in this case by distinguishing from it the case then before them. The case presented to the court was one where an expert was asked: "Would a violent fall from a street car cause that displacement of the womb which you discovered?" The witness answered: "I think it would, perhaps; when a lady jumps out of a wagon, alighting heavily upon a pavement, a solid woman, it will displace the womb." Mr. Justice Montgomery, in commenting upon the question and answer, said:

"The witness had previously testified that the plaintiff was suffering from a displacement of the womb. The testimony given in answer to the above-quoted question was proper, as showing the character of the cause which *might* have produced the injury. The question did not, as was the case in Jones *v.* Village

(*a*) People *v.* Hare, 57 Mich 505.
(*b*) State *v.* Rainsbarger, 74 Ia. 197.
(*c*) Jones *v.* Village of Portland, 88 Mich. 598.

of Portland, call for the opinion of the witness on the whole case. The extent to which the ruling went was to permit a doctor to state whether a cause which was alleged existed would, in his opinion as a medical man, be sufficient to produce a condition which it was claimed resulted from this cause." (*a*)

The italics in the above quotations are here inserted for the purpose of calling the reader's attention to the precise distinction between the two classes of cases. This distinction is disapproved in the case of Donnelly *v.* St. Paul City Ry. Co., (*b*) decided by the Supreme Court of Minnesota in 1897, which, in the writer's opinion, lays down the correct doctrine. In this case a long hypothetical question had been framed setting forth the circumstances of the accident and the details of the condition of the patient which ensued, at the end of which the physician was asked: "What would you say, in your opinion, was the cause of her condition?" As to whether or not the question was proper, Mr. Justice Mitchell delivered the opinion of the court, which is so clear upon the subject and, in the author's opinion, so well expresses the law, that the following extended quotation is made:

"It is laid down in the books that a question to an expert witness should not be so framed as to invade the province of the jury; but the line of cleavage between what does and what does not invade the province of the jury is not capable of definite location by any exact rule applicable to all cases, without regard to the subject of inquiry. The mere fact that the opinion called for covers the very issue which the jury will have to pass upon is not conclusive that it is not the proper subject of expert or opinion evidence. For example, sanity or insanity is the subject of expert testimony, although that may be the sole issue to be determined by the jury. Neither do we appreciate the fine distinctions sometimes sought to be drawn between asking an expert whether, in his opinion, certain causes might produce certain results, and asking him whether, in his opinion, they did produce such results.

"It is well settled that the opinions of medical experts as to the cause of death are admissible, such opinions being founded either upon the personal knowledge of the facts of the case, or upon a statement of the nature of the injury or symptoms and nature of the disease, as testified to by others (Rogers, Exp. Test., Sec. 49, and cases cited). There can be no difference in principle between an opinion as to the cause of death and one as to the cause of physical ailments which have not resulted in death.

"This court has held that, in answering a hypothetical question embodying a person's assumed symptoms and conditions, as testified to by others, a medical expert may give his opinion as to the probability of recovery (Peterson *v.* Chicago, 38 Minn., 511); also, that a physician who has heard the testimony

(*a*) Lucas *v.* Detroit City Ry. Co., 92 Mich. 412. (*b*) Donnelly *v.* St. Paul City Ry. Co., 70 Minn. 278.

as to the manner in which the plaintiff was injured, the kind of injuries inflicted and his present bodily condition, may give an opinion, based on that evidence, as to the cause of plaintiff's condition (Cooper *v.* St. Paul, 54 Minn., 379). This case is directly in point."

To fully illustrate the matters upon which a physician may give his opinion as an expert witness would be impossible within the limits of this article. Therefore, without further enumeration of such matters, this section will be closed with the suggestion that the physician, testifying as to the possibility or impossibility of a certain act or thing, should remember that his evidence may be rebutted by testimony of a witness that he has performed the act or accomplished the thing which the expert has testified to be impossible. (*a*) A case illustrating the pertinence of this suggestion was related to the author some years ago by a lawyer who was present at the trial. Two men had broken into the house of an old couple at night and entered the sleeping-room. The old people were awakened by the noise. The old lady, rising up, took her glasses from the head-board of the bed, and, by their aid, claimed to have recognized the men just as they shot and killed the husband. Upon trial of the accused, the defence introduced an oculist who testified that he had examined the eyes of the old lady and the glasses in question, and that it was a physical impossibility for her to recognize a person by the aid of those glasses at the distance at which it was testified the murderers were, as the lenses of the eyes and the glasses could not focus at that point. Counsel for the prosecution, in rebuttal, identified the glasses in question, asked the old lady to take the witness stand, and caused several men, including the accused, to stand in front of her at the distance testified; thereupon he handed her the glasses and asked her to "pick out the men who shot your husband." After adjusting the glasses, she peered into the faces of the several men until she came to the accused, when she promptly identified them as the men who had committed the crime.

Standard Treatises, Admissibility in Evidence.

Upon first consideration, it would seem that when facts in a case presented questions of medical science to be determined by the jury, standard medical works might be read in evidence to aid the

(*a*) Commonwealth *v.* Leach, 156 Mass. 99.

jury to determine the question. According to the great weight of authority, however, such practice is improper.

The question was passed upon in England, in 1831, in the case of Collier *v.* Simpson, 5 C. & P., 73, wherein Chief Justice Tindal said: "I do not think the books themselves can be read; but I do not see any objection to your asking Sir Henry Halford his judgment, and the grounds of it, which may be, in some degree, founded upon books, as a part of his general knowledge."

In an early Iowa case, (*a*) in which a physician was sued for malpractice in an accouchement case, and in defence set up that he had followed the botanic system of practice, the defendant, for the purpose of proving the methods of practice sanctioned by his school of medicine, offered in evidence certain standard works on botanic medicine, and the books were held to be admissible. The Supreme Court of the same State, however, in 1898, in a case (*b*) where counsel had read extracts of certain medical works in evidence, distinguished the case of Bowman *v.* Woods and limited the application of the words there used to the particular facts there involved. The court said: "The reasoning does not apply to a case where the school or system is not involved." That medical works could not ordinarily be read to the jury, the court was clear, for the reasons: (1) that such works, containing technical terms, could not ordinarily be understood by one unfamiliar with the nomenclature of the medical profession, and their reading was, therefore, liable to confuse rather than to enlighten the jury. (2) The ephemeral character of the accepted views and the great conflict between the advocates of the different theories, render of questionable authority the matter contained in a text-book. Said the court: "If those learned in medicine are often unable to determine from the books the nature and extent of injuries and diseases, how shall the layman be better informed by an examination of them?" (3) That the evidence should be given under oath, and that both the underlying reason of the theory, and the practical skill in its application to the particular case, should be shown by cross-examination. "We think," said Mr. Justice Ladd, speaking for the court, "the safer practice is to rely upon the testimony of living witnesses of the medical profession, who may bring

(*a*) Bowman *v.* Woods, 1 G. Green, 441. (*b*) Bixby *v.* Railway & Bridge Co., 105 Ia. 294.

the learning and research of the books within the comprehension of the jurors, and the truth of science to the facts in each particular case."

In every State where the question has been considered, except Alabama, practically the same result has been reached. In Alabama, medical works are received in evidence. (*a*)

Various plans have been acted upon for the purpose of getting the contents of medical works before the jury, but the effort is generally ineffectual. The counsel, having a medical expert upon the witness stand, would read to him from a medical work and ask him if the passage read coincided with his judgment or view. According to another plan, the medical expert has quoted from text-books; and according to another, counsel, in his argument, has read to the jury from a medical text-book; while, according to still another, the opposing counsel has, upon cross-examination, read to the witness a passage from a medical work and asked if he agreed with it. All of these practices have been held to be improper by most courts, although the first plan has met with the approval of the Supreme Court of Illinois. (*b*)

The only generally recognized exception to the rule prohibiting the reading of medical text-books upon the trial is the one which permits opposing counsel, upon cross-examination, where the witness has stated the source of his professed knowledge, to read from the works so referred to for the purpose of showing that their contents have been misstated, and thereby discrediting the witness. This practice is generally held to be proper and is a practice exceedingly discomforting to a physician who inadvertently, or through ignorance, misquotes an author upon the witness stand.

Weight of Expert Evidence.

The force and effect which is to be given to expert evidence by the jury, in the course of its deliberation, is a question upon which the opinions of the courts of the several States have greatly differed. There is a well-recognized line of decisions to the effect that expert evidence should be received with caution, and, being a mere expression of opinion, is not entitled to receive the same weight as testimony

(*a*) Stoudenmeier *v.* Williamson, 29 Ala. 558. (*b*) Scott *v.* People, 141 Ill. 195.

by an ordinary witness of a fact within his knowledge. This distinction was clearly cut by the trial judge in a New York case, who, in the course of his instruction to the jury, said:—

"When a physician testifies in regard to a fact, you are to believe it just as you are to believe any other man of equal credit.

"When they testify to a fact that they know from their study of diseases, and their characteristics, and tell us what there is of the facts, you are to believe it. When they testify in regard to opinions, it becomes a different question. . . . Everything that these physicians testify to as matters of observation, and by which they are able to tell you the characteristics of the disease, you are to believe as facts, as you would otherwise.

"In considering their testimony, you will consider, in reference to each statement, whether it is a fact or an opinion: you will apply this rule to all the facts connected with the case, that are derived from the investigations of these physicians." (*a*)

On the other hand, other courts have held that expert testimony should be considered like other evidence, while still other courts hold that expert evidence is entitled to but little weight. Most of the cases in which this unfavorable view has been expressed have been those where the testimony in question was that of handwriting experts.

As against the view last expressed, many courts have asserted that the opinions of physicians upon medical matters have great weight; but others, again, have expressed the view that the opinions of physicians as to mental condition is entitled to no greater weight than that of ordinary persons.

These different views seem utterly irreconcilable, but, by a careful examination of the facts before the court in each particular case, much of their inconsistency disappears. The circumstances of the cases, the condition of the patients, the opportunities of the physicians to comprehend those circumstances and conditions, the character of the testimony or opinions they were called upon to express, all have had their effect in producing these varied expressions of judicial opinion. The idea is well expressed by Mr. Justice Woodruff in the case of Gay *v.* Union Mutual Life Ins. Co., (*b*) in which he says:

"Where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance,

(*a*) People *v.* Montgomery, 13 Abb. Pr. N. S. 207. (*b*) 9 Blatch. 142.

because it states only a probability. Where the opinon is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury." (*a*)

The manner in which the weight ordinarily to be given to expert testimony may be materially altered is illustrated in a case where the physician, after testifying that deceased was poisoned by arsenic and died from the effects of that poison, was asked upon cross-examination if his medical opinion was formed from the symptoms stated, to which he answered: "No, and that he would not have formed that opinion as to the poisoning by arsenic if he had not been informed that Sam Hooks, her husband, had arsenic in the house for his hogs; but, learning this fact, he came to said conclusion from observation of the symptoms of the case."

The manifest effect of this acknowledgment was to greatly impair the effect of the opinion previously given, though it did not render it inadmissible. (*b*)

Witness Fees.

It has been heretofore shown that the witness is brought into court to testify by means of the subpœna ; that in all civil cases, to render the service of the subpœna effective, it is necessary that the *per diem* and mileage be paid or tendered to the witness, but that in criminal cases the payment or tender of the witness fee and mileage is not necessary, but the witness will be required to attend and testify, with the right to afterward accept such provisions as may be made for his compensation. As to the ordinary witness, the extent of the compensation to which he is entitled is easily determined and free from doubt; he is entitled to the *per diem* allowed by statute, usually a nominal amount, for each day during which he attends court, together with mileage for the distance necessarily traveled between his home and the court.

Fees of Expert Witness.

When the witness is an expert and called as such, the amount of fees to which he is entitled is a question into which other

(*a*) For full treatment of the subject see Rogers on Expert Testimony, ch. XI.

(*b*) Mitchell *v.* State, 58 Ala. 417.

considerations enter than in case of an ordinary witness. It has been entertained by able writers that the skill and learning of the physician who is called to give his opinion in court as an expert are to such an extent his property—that he can no more be required to testify against his will than he can be compelled to render services as a physician contrary to his desire. This view is expressed by Ordronaux, while Rogers, writing as late as 1890, says that the question whether the expert is entitled to extra compensation, or merely the fees of an ordinary witness, is one upon which the courts are about evenly divided.

An examination of the decisions now existing shows that Mr. Rogers' statement is no longer correct; for, while we find the Supreme Court of Indiana (*a*) holding that the physician may not be required to testify as an expert witness without the payment of special compensation, the courts of Alabama (*b*), Arkansas (*c*), Colorado (*d*), Illinois (*e*), Minnesota (*f*) and Texas (*g*) hold that he will be required to testify as an expert witness without compensation other than that of an ordinary witness. Even in Indiana the force of the decision above mentioned is overcome by a more recent statute which provides that an expert witness may be compelled to appear and testify to an opinion without tender or payment of compensation "other than the *per diem* and mileage allowed by law to witnesses."

Several States have by express statutes provided for the payment of special or extra fees to experts, (*h*) the amount of such extra fee being, in some of these States, left to the discretion of the court, while several States have enacted laws authorizing the district attorney to procure the services of an expert witness, and to obligate the county to pay a reasonable compensation therefor. Such statutes are, however, strictly construed and no rights conceded to the witness to which he is not entitled by reason of a strict compliance with the terms thereof.

(*a*) Buchman *v.* State, 59 Ind. 1.
(*b*) Ex parte Dement, 53 Ala. 389.
(*c*) Flinn *v.* Prairie Co., 60 Ark. 204.
(*d*) Larimer Co. Comrs. *v.* Lee, 3 Colo. App. 177.
(*e*) Dixon *v.* People, 168 Ill. 179; No. Chi. St. R.R. Co. *v.* Zeiger, 182 Ill. 9.
(*f*) State *v.* Teipner, 36 Minn. 535. The Legislature of Minnesota has provided that "the judge of any court of record in this State, before whom any witness is summoned, or sworn and examined, as an expert in any profession or calling, may, in his discretion, allow such fees or compensations as, in his judgment, may be just and reasonable." L. Minn. 1894, Sec. 5547.
(*g*) Summers *v.* State, 5 Tex. App. 365.
(*h*) Iowa, Louisiana, Minnesota, North Carolina, North Dakota, Rhode Island and Wyoming.

To sum up: The expert witness is entitled to only the regular *per diem* and mileage for attending court and testifying, except in those States where special provisions have been made by statute giving him extra compensation. Accordingly it follows that the witness, except when he is entitled to the benefit of such special provisions, who is called to give his opinion as an expert, is no more justified in withholding his testimony, because special payment therefor is not provided, than a witness called to testify to facts within his knowledge, and, in case of such refusal to testify, would probably be as quickly committed for contempt of court as if he were an ordinary witness subpœnaed to testify to facts.

This requirement, however, to answer a subpœna and testify for the statutory *per diem* and mileage, imposes upon the expert witness only the duty of giving impromptu answers to the questions put to him upon the witness stand, but does not require him to make any special preparation to qualify himself for the occasion. If the party for whom the testimony is to be given wishes the witness to make a special study or investigation of the case, or to attend during the whole trial and attentively hear and carefully consider the testimony given by both sides, so as to be qualified to give an opinion which shall be the result of mature reflection and calculated to withstand the attack of cross-examination, he must make some special arrangement as to compensation with the witness, and for such services the witness will be entitled to require such compensation as may seem to him adequate and proper. In practical working, this limitation of the general rule requiring the expert witness to testify for the regular witness fees, relieves the physician, in most cases, of the hardship of spending his time in court for a mere nominal amount and enables him to ask and receive a fair compensation for his skill and ability exercised in this class of work.

It has, however, been urged that the payment of this special fee to a physician, procured to testify as an expert, is irregular, and, when the arrangement becomes known only after the witness has testified, is ground for a new trial.

This point was forcibly urged before the General Term of the Supreme Court of New York, in 1872, *(a)* and the decision there rendered seems to have been consistently followed by other courts.

(a) People *v.* Montgomery, 13 Abb. Pr. N. S. 207.

In this case the defendant was on trial for the murder of his wife; the only question at issue was the sanity of the defendant. The district attorney went to New York City and presented the case to a well-known physician and specialist in mental diseases, and asked him for his opinion as to the defendant's sanity. The physician informed the district attorney that he could not give a satisfactory opinion without seeing and examining the defendant, and, after a request for terms, said that he would go to the place of trial, examine the defendant and attend the trial as witness for five hundred dollars. In passing upon the propriety of such an arrangement the Court expressed itself as follows :—

"The district attorney, it is true, might have required the attendance of Dr. H. on subpœna, but that would not have sufficed to qualify him to testify as an expert, with clearness and certainty, upon the question involved. He would have met the requirements of a subpœna if he had appeared in Court, when he was required to testify, and given proper impromptu answers to such questions as might then have been put to him in behalf of the people. He could not have been required, under process of subpœna, to examine the case and to have used his skill and knowledge to enable him to give an opinion upon any points of the case, nor to have attended during the whole trial and attentively considered and carefully heard all the testimony given on both sides, in order to qualify him to give a deliberate opinion upon such testimony as an expert in respect to the question of the sanity of the prisoner. Professional witnesses, I suppose, are more or less paid for their time and services and expenses, when called as experts in important cases, in all parts of the country. The question, what amount is paid or agreed to be paid in such cases cannot affect the regularity of a trial. It may, perhaps, properly affect the question of their credit with the jury."

If, in a criminal trial, where every reasonable safeguard and protection is thrown about the accused, an arrangement of this character will not be considered an irregularity, much less will such an arrangement be subject to like criticism in a civil suit.

An arrangement with counsel for such special services must be free from champerty, or it will be void and unenforceable. Accordingly, a contract which provides that the compensation of the witness shall be commensurate with or dependent upon the success of the party in whose behalf he testifies, is objectionable and cannot be enforced. (*a*)

(*a*) For further illustration of this rule and treatment of the subject generally see Law in its Relations to Physicians, Ed. 1904, p. 175.

The arrangement or contract for such services being valid, and having been carried out by the physician, he may then enforce the payment of his fees by suit, and if no definite amount is fixed in the agreement, then he may recover a fair and reasonable sum for the services.

The manifest purpose of the law to do justice is again shown in a case where a party arranged with a physician to make such special preparation, and, after the physician had made such preparation, subpœnaed him and paid the regular *per diem;* in such a case the law will require the party to pay such special compensation in addition to the regular fees. (*a*)

The extra fees or compensation which a party pays to an expert witness cannot be recovered by him from the adverse party, but must be borne by him irrespective of the result of the litigation.

(*a*) Barrus *v.* Phaneuf, 166 Mass. 125.

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